Brown & Sharpe Manufacturing Company *and* District Lodge 64, International Association of Machinists & Aerospace Workers, AFL–CIO, and its Local Lodges 883, 1088 and 1142 *and* Local No. 119, International Federation of Professional & Technical Engineers, AFL–CIO. Cases 1–CA–19224, 1–CA–19690, 1–CA–19958, 1–CA–20283, 1–CA–20291, 1–CA–20304, 1–CA–20508, 1–CA–21560, and 1–CA–19567

September 27, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case is on remand from the United States Court of Appeals for the District of Columbia. This court asked the Board to explain the standard that it applied to find that allegations of bad-faith bargaining in this case are time-barred under Section 10(b) of the Act.[1]

In the underlying proceeding, the General Counsel reinstated charges alleging bad-faith bargaining, which charges he had dismissed 2 years earlier. Relying on the discovery of documents concerning the Respondent's preparations for negotiations, the General Counsel contended that, under the rationale of *Ducane Heating Corp.*,[2] the Respondent's failure to disclose the documents amounted to a fraudulent concealment of operative facts warranting the tolling of the 10(b) limitations period. The Board rejected this contention. It reviewed the evidence allegedly concealed and concluded that the Respondent's failure to disclose the documents did not amount to a fraudulent concealment of ''operative facts'' under *Ducane*. On review, the court upheld the *Ducane* doctrine and its retroactive application to this case. However, the court held that the Board did not explicitly embrace any particular standard in finding that the documents did not amount to ''operative facts'' and left obscure how significant the evidence must be to constitute ''operative facts'' within the meaning of the *Ducane* exception.

The Board has accepted the court's remand and sets forth here a clarification of the *Ducane* exception and how it applies in this case.

The Board consistently has applied the equitable doctrine set forth in *Holmberg v. Armbrecht*.[3] Under that doctrine, if a party ''has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . . .'''[4] This doctrine is the basis of the *Ducane* exception for fraudulent concealment. It is the doctrine which guided the Board's initial decision in this proceeding, and it guides us now.

Concededly, the Board did not state expressly that it was applying the *Holmberg* doctrine. In addition, the *Holmberg* doctrine does not explicitly set forth a standard concerning the character of the evidence that is concealed.[5] As to that issue, the D.C. Circuit cited *Fitzgerald v. Seamans*,[6] a case which relies on *Holmberg*. In *Fitzgerald*, the D.C. Circuit stated that ''deliberate concealment of *material* facts'' tolls the Federal statutes of limitations until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit.[7] (Emphasis added by court in instant case.) We agree with the *Fitzgerald* standard. We recognize that, in *Ducane* and in other subsequent cases, including the instant case, the Board used the phrase ''operative facts.'' We regret doing so. We did not intend to denote a disagreement with the standard of ''material facts,'' the phrase used in *Fitzgerald*. In this case and in the future, we shall use the latter term.

A. *The Board's Historical Application of the Holmberg Doctrine*

The *Holmberg* doctrine, as described in *Fitzgerald* and as applied by the Board, has three critical requirements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. All

[1] On August 28, 1990, the National Labor Relations Board issued its Decision and Order in this proceeding dismissing the complaint. See 299 NLRB 586. District Lodge 64, International Association of Machinists and Aerospace Workers, AFL–CIO and its Local Lodges 883, 1088 and 1142 filed with the D.C. Circuit a petition for review of the Board's Order.

In an opinion dated November 29, 1991, the court remanded the case to the Board. *District Lodge 64, International Association of Machinists and Aerospace Workers, AFL–CIO, and its Local Lodges 883, 1088, and 1142 v. NLRB*, No. 90–1503.

By letter dated February 19, 1992, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the remand. The General Counsel and the Respondent filed statements of position with the Board.

[2] 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986).

[3] 327 U.S. 392, 397 (1946).

[4] See, e.g., *Crown Cork Co.*, 255 NLRB 14 (1981); *ACF Industries*, 231 NLRB 83 (1977); *Burgess Construction*, 227 NLRB 765 (1977); *Avila Group, Inc.*, 218 NLRB 633 (1975).

[5] We note also that *Holmberg* does not itself explain what kinds of action by a defendant will be regarded as acts of fraudulent concealment. By embracing *Holmberg*, we do not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts. See *Teamsters Local 170 v. NLRB*, 993 F.2d 990 (1st Cir. 1993) (noting that Board holdings have not followed Federal cases allowing a finding of fraudulent concealment on the basis of a ''self-concealing scheme'' as opposed to independent affirmative acts of concealment). In addition to considerations that have shaped that doctrine in the courts, the Board properly considers ''the industrial relations policy favoring finality in the resolution of labor disputes.'' Id. Board cases on the standard for determining whether ''concealment'' is present are cited at fns. 21–23, infra.

[6] 553 F.2d 220 (D.C. Cir. 1977).

[7] Id. at 228.

three elements must be met to warrant the tolling of a statute of limitations. In the instant case, the majority of the Board did not reach the first and third elements. Instead, the majority addressed only the element of whether the allegedly concealed evidence constituted material facts.[8] That is the only element we address here.

Over the years, the Board has described the element of material facts in the *Holmberg* doctrine in different ways. It has referred to ''violative conduct,''[9] an ''act constituting [the unfair labor practice],''[10] ''vital information,''[11] ''material events,''[12] and ''an essential element needed to perfect [the charging party's] case.''[13] In 1982, the Board began consistently to use the term ''operative facts.'' See *Winer Motors*.[14] The majority opinion in *Winer Motors* stated: ''We agree with the principle enunciated in the cases relied on by our dissenting colleagues that where a respondent fraudulently conceals from a charging party the operative facts underlying a violation of the Act, the limitations period does not begin to run until the charging party knows or should have known of such operative facts.'' *Holmberg* was the lead case relied on by the dissenting opinion in support of that principle. As the above quotation demonstrates, the majority agreed with that principle.

The *Winer* rule applied to charges that were *withdrawn* and later resurrected. In *Ducane*, the Board held that the same rule would apply to charges that were *dismissed* and later resurrected. In both situations, a resurrection of the charge, outside the 10(b) period, would not be permitted unless there were ''special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation.''[15]

The Board has applied the *Holmberg* doctrine in 8(a)(5) cases to find a tolling of the 10(b) period where respondents have concealed the employment of nonunion employees under nonunion conditions,[16] the dissolution of a multiemployer bargaining association,[17] the subcontracting of bargaining unit work,[18] the closing and relocation of a plant,[19] the closing and reopening of a plant,[20] and details of the interrelationship between two companies so as to convey the impression that the companies were entirely separate entities.[21]

In its application of the *Holmberg* doctrine, the Board has not treated every act of concealment as a form of fraudulent concealment that warrants tolling of the limitations period. The Board has found that exculpatory statements by a respondent which are false or misleading are not sufficient to toll 10(b) where the charging party independently was aware of certain facts suggesting possible unlawful conduct.[22] Similarly, the Board has found that the concealment of an unlawful motive for discharge will not toll the limitations period if the charging party is aware of facts which raise a question about the true motive for the discharge.[23] Finally, the Board has found no tolling of the statute in an unlawful discharge case when the concealed evidence did not have a direct bearing on the performance of the discriminatee's duties and thus did not amount to concealment of an ''operative fact'' pertaining to the alleged discharge.[24]

With respect to the issue under discussion, the relevant principle applied in these cases is that concealed evidence is ''material'' if it would make a critical difference between establishing a violation and not doing so. Thus, if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge, provided that the other two elements are present, viz, the evidence was fraudulently concealed and the injured party could not have discovered the evidence earlier through the exercise of due diligence.[25]

This principle is illustrated in *Duff-Norton*. In that case the concealed evidence was that a supervisor tampered with machines in order to ''set up'' a quality

[8] Because the Board found the evidence was *not* material to the cause of action, it was unnecessary to reach the other elements of the *Holmberg* doctrine.

Chairman Stephens agreed with the analysis concerning material facts. He also relied on the judge's analysis of fraudulent concealment. See his dissent in *Kanakis Co.*, 293 NLRB 435 (1989).

[9] *Avila Group, Inc.*, supra at 639.

[10] *Burgess Construction*, supra at 766.

[11] *ACF Industries*, supra at 83 fn. 1.

[12] *Crown Cork Co.*, supra at 22.

[13] *Safety-Kleen Corp.*, 279 NLRB 1117, 1119 (1986).

[14] 265 NLRB 1457, 1458 (1982).

[15] *Ducane Heating Corp.*, supra at 1390.

[16] *Burgess Construction*, supra.

[17] *Lehigh Lumber Co.*, 238 NLRB 675 (1978).

[18] *ACF Industries*, supra.

[19] *Strawsine Mfg. Co.*, 280 NLRB 553 (1986).

[20] *O'Neill, Ltd.*, 288 NLRB 1354 (1988).

[21] *Barnard Engineering Co.*, 295 NLRB 226 (1989).

[22] *Girardi Distributors*, 307 NLRB 1497 (1992), enfd. sub nom. *Teamsters Local 170 v. NLRB*, supra; *John Morrell & Co.*, 304 NLRB 896 (1991); *Al Bryant, Inc.*, 260 NLRB 128, 134–135 (1982). Compare with *O'Neill, Ltd.*, supra, where the Board found that the respondent's exculpatory statements were part of a scheme of concealment and thus contributed to a finding that the limitations period should be tolled.

Member Devaney dissented in *John Morrell & Co.*, supra, and finds it unnecessary to rely on it.

[23] *Safety-Kleen Corp.*, supra.

[24] *Duff-Norton Co.*, 275 NLRB 646 (1985).

[25] We believe our approach is similar to that in *Hohri v. U.S.*, 782 F.2d 227, 249–250 fn. 57 (D.C Cir. 1986), where the court clarified its standard for tolling a statute of limitations in a case of concealment. There, the court stated:

> We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage.

control inspector for discharge. Concededly, the evidence was relevant to the allegation of unlawful discharge. However, the Board essentially found that this evidence would not have made a critical difference in establishing a violation. The tampering caused the production of defective parts. The inspector was discharged for failure to spot the defective parts. Even if the evidence concerning the tampering had been adduced, the fact would remain that the inspector failed to spot the defective parts. In sum, the concealed evidence would not have made a critical difference in establishing a violation.

B. *The Board's Use of the Holmberg Doctrine in this Case*

Applying this standard in the instant case, the Board concluded that the Respondent's position papers were not critical to the establishment of a violation. In reaching this conclusion, we reviewed the documents in a light most favorable to the General Counsel by assuming that they were authentic expressions of the Respondent's bargaining intentions. We did so despite the fact that they were records of preliminary meetings held some 3 months in advance of actual negotiations.

We analyzed the statements concerning job preference and mandatory transfers in the context of the entire document in which they appeared. Our review of the statements on job preference revealed only two statements which could support the General Counsel's case. The job preference position paper ended with a summary which stated, inter alia, ''Shop management does not feel job preference significantly affects the cost of operating the shop.''[26] The paper recommended that the issue not be raised in negotiations. Standing alone, these statements supported the allegation that job preference was not important for the Respondent. The statements thus raised questions as to why the matter was later pressed in negotiations. When the position paper was read as a whole, however, it indicated that job preference was a serious issue over which the Respondent and the Union had struggled for 3 years, that the recommendation not to negotiate job preference was based on a concern that failure at the negotiation table would weaken the Respondent's position if job preference were arbitrated, and that shop managers found that job preference was a ''general annoyance'' which made their jobs harder even though it had a minimum cost impact.[27] The document as a whole, therefore, did not make a critical difference in establishing the General Counsel's case.[28]

We also took into account the indication in the steering committee's minutes that no final decision on job preference was taken at the June 1, 1981 steering committee's meeting. Instead, the minutes recorded that two representatives of a higher level of management stated they might want to review the issue again. On its face, therefore, the documents showed that the Respondent considered the issue of enough importance to its negotiating stance to leave it open rather than to drop it conclusively.

We reached a similar conclusion on the mandatory transfer documents. The position paper on transfers stated that managers had been able to use lack of work, temporary, and company-requested transfers with ''very few problems,'' and noted that the Union had not held the Respondent to its contractual obligations to give a 5-day notice prior to layoff in cases where employees were to be transferred due to lack of work. The minutes of the steering committee stated that the managers ''could live with the language as it is.'' These statements, standing alone, supported the allegation that mandatory transfers were not an important issue for the Respondent. The steering committee's minutes, however, showed that representatives of a higher level of management did not fully accept the shop managers' view on transfers and ''expressed concern that we may still want to change the language.'' As in the case of job preference, the documents as a whole indicated that the Respondent considered the issue of enough importance to its negotiating stance to leave it open for consideration.

Reviewing the allegedly concealed documents as a whole and assuming they were an authentic expression of the Respondent's bargaining intentions, we found that they did not support the allegation that the Respondent engaged in surface bargaining.

We reaffirm these findings. Applying the standard set forth above, we conclude that, although the documents may be relevant to the charge of surface bargaining, they do not make a critical difference in establishing a violation. They therefore do not constitute material facts. Accordingly, the alleged concealment of these facts does not toll the 10(b) period.

ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 299 NLRB 586 (1990), and dismisses the complaint.

[26] 299 NLRB 586, 587.

[27] Id.

[28] Id. at 589. In our initial decision, we also stated that we found no inherent contradiction between the Respondent's June position papers and steering committee's minutes on job preference and mandatory transfers and the Respondent's September position papers for actual negotiations. Id. In so doing, we did not intend to suggest that only an inexplicable contradiction would be sufficient to warrant tolling of the statute. We were, instead, only disagreeing with the General Counsel's argument that the June documents contradicted the September documents.